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In the Supreme Court of the United States

DAVID H. BARAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a remittance of estimated taxes or of taxes withheld from wages is a payment of tax that is subject to the limitation on tax refunds set forth in Section 6511(b) of the Internal Revenue Code, 26 U.S.C. 6511(b).

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In the Supreme Court of the United States

No. 98-1667

DAVID H. BARAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The judgment and memorandum of the court of appeals (Pet. App. A1-A4) and the opinion of the district court (Pet. App. A5-A10) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1999. The petition for a writ of certiorari was filed on April 13, 1999, and was granted on September 28, 1999. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

The relevant portions of Sections 6151, 6315, 6401, 6402, 6511, and 6513 of the Internal Revenue Code, 26 U.S.C. 6151, 6315, 6401, 6402, 6511, and 6513, and of 26 C.F.R. 301.6402–3, are set forth at App., *infra*, 1a-7a.

STATEMENT

1. During 1988, petitioner's employer withheld a total of $4104 in federal income taxes from petitioner's wages and remitted those taxes to the United States. In January 1989, petitioner made an additional remittance to the United States of $1100 as an estimated tax for the fourth quarter of 1988.[1] Petitioner sought and was granted an extension of time, to August 15, 1989, in which to file his 1988 income tax return. Petitioner never sought nor received any further extension of time, and he did not file his return for that year until June 1, 1993. Pet. App. A3, A5-A6.[2]

[1] The remittance of estimated taxes was made by petitioner on IRS Form 1040-ES, which is a "Payment Voucher." C.A. App. 20. This Form specifies that the taxpayer is to make "your payment with this voucher" (*ibid.*). In completing and submitting this payment voucher Form, petitioner designated the sum of $1100 as the "[a]mount of payment" (*ibid.*).

[2] Although petitioner now attempts to construct a benign explanation for the late filing of his return (Pet. Br. 3-4 & 27 n.11), he has previously candidly acknowledged that his return "was late because the records needed to prepare the return were lost" by him (C.A. App. 34). Even though petitioner was aware that he had "either misplaced or lost the records * * * needed to file the return," he "didn't take any steps [to obtain that information] because for a long time I was hoping that those records would show up." *Id.* at 59, 60. He stated that he was in no hurry to obtain the information because he thought he "possibly * * * had overpaid the taxes * * * and I thought that all I was doing was delaying a refund." *Id.* at 60. He did not remember any "details" of attempting to get the records but stated that he contacted a "local office here in Washington" seeking to have his tax records "transferred to Washington so that I could discuss it with someone here and I was unsuccessful in getting that done." *Id.* at 61. Petitioner never identified the date or context of these purported discussions with the "local office," but has acknowledged that (i) he first made a written request for information from the Internal Revenue Service *after* the Service wrote to him concerning his failure to file a return (Pet. Br. 3) and, (ii) upon receiving that written request, the Service promptly furnished him with copies of the information that he claimed to need (*id.* at 4).

On the untimely 1988 return that petitioner filed in 1993, he claimed that his 1988 taxes had been overpaid by $1175, and he sought to have that overpayment credited against his outstanding tax obligations for 1989. The Internal Revenue Service assessed the tax liability reported by petitioner on his belated 1988 return but denied the requested credit of the overpayment. Pet. App. A3, A6. The Service concluded that the requested credit was barred by Section 6511(b) of the Internal Revenue Code, which specifies that "the amount of [any] credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return." 26 U.S.C. 6511(b)(2)(A). Because petitioner's refund claim was filed after the period described in Section 6511(b)(2)(A) had expired, no refund or credit could be allowed on the untimely claim.

2. Petitioner thereafter commenced this refund suit in federal district court. Petitioner claimed that the withheld and estimated tax remittances made with respect to his 1988 liability were "deposits" rather than "payments" of tax and that the statutory limitations on the recovery of taxes based upon the time "the tax [was] paid" (26 U.S.C. 6511(b)(2)(A)) therefore did not bar his refund claim. Pet. App. A3, A6.

The district court rejected petitioner's claim. The court held that the remittances of withholding and estimated taxes constituted "payments" of tax that were subject to the statute of limitations. After these pay-

ments were made, more than four years elapsed before petitioner filed his tax return and refund claim. Pet. App. A6. Because the refund claim was thus not made within the three-year period permitted under Section 6511(b)(2)(A), the court held that petitioner's claim was barred by the plain text of the statute. Pet. App. A8.

In so ruling, the court rejected petitioner's reliance on *Rosenman* v. *United States*, 323 U.S. 658 (1945). The court explained (Pet. App. A8) that *Rosenman* is premised on the existence of an "interim arrangement" between the taxpayer and the Internal Revenue Service under which money is remitted and "held not as taxes duly collected * * * but as a deposit in the nature of a cash bond" (323 U.S. at 662). In the present case, petitioner cannot "point to any analogous arrangement between himself and the IRS in which he indicated that he wished [the] remittance to be held as a cash bond or 'deposit.'" Pet. App. A8.

3. The court of appeals affirmed. Pet. App. A1-A4. The court held that the contention that the remittances of withheld and estimated taxes were deposits rather than payments of tax is "foreclosed by the plain language of the statute" (*id.* at A3):

> Section 6513(b)(1) provides that any amount of tax withheld from wages is "deemed to have been paid" by the recipient of the income on April 15 of the following year. Similarly, § 6513(b)(2) provides that any amount paid as estimated tax shall be "deemed to have been paid" on April 15 of the following year.

The court concluded that the remittances of withheld and estimated taxes "were payments as a matter of law" under the plain text of these statutory provisions. Pet. App. A3. The court explained that the rationale of

Rosenman does not apply to a case, such as the present one, which involves a "statutorily defined payment" rather than a consensual deposit arrangement. Pet. App. A4.

SUMMARY OF ARGUMENT

Remittances of estimated taxes and of taxes withheld from wages are "payments" of income tax that are subject to the limitation on tax refunds set forth in Section 6511(b) of the Internal Revenue Code. In enacting the provisions of Section 6513(b) of the Code, Congress specified that such remittances are payments of income tax that, for the purpose of the tax refund provisions of the Code, are "deemed to have been paid" on the date the return is first due. 26 U.S.C. 6513(b)(1), (2). Because petitioner's claim for refund was made more than three years after the date on which his payments were "deemed to have been paid" under Section 6513(b), it is barred by the plain language of the statute of limitations contained in Section 6511(b)(2)(A).

Petitioner is wrong in ignoring these controlling statutory provisions and in asserting that a "payment" cannot be made without an "assessment" of tax. The liability of any taxpayer for the federal income tax arises upon his receipt of "taxable income" (26 U.S.C. 1(a)). Numerous provisions of the Code make clear that this liability does not depend on any subsequent assessment of the tax by the Internal Revenue Service. In particular, Section 6151(a) specifies that the obligation to pay the tax is fixed by law, "without assessment" or any notice or demand, on the due date of the return. 26 U.S.C. 6151(a). The Code further makes clear that the liability for tax which arises upon the receipt of income may be collected in a suit brought "without assessment" of the tax. 26 U.S.C. 6501. An assessment is not a

prerequisite to liability; it is instead an administrative determination which, when made, confers *additional* administrative enforcement powers (such as liens and levies) on the Service. Under the Internal Revenue Code, taxes are to be paid, and routinely are paid, "without assessment."

Petitioner errs in contending that the decision of this Court in *Rosenman* v. *United States*, 323 U.S. 658 (1945), compels a different conclusion. In *Rosenman*, the Court concluded that a "deposit" (as distinguished from a "payment") occurs when the taxpayer and the government enter into a "business transaction" or "arrangement" under which a remittance is tendered by the taxpayer, and accepted and treated by the government, as a "deposit * * * in the nature of a cash bond." 323 U.S. at 662, 663. The facts of this case plainly reflect that petitioner did not designate his remittances as "deposits" and that the United States and petitioner made no consensual deposit "arrangement" of the type described by the Court in *Rosenman*. In view of the fact that petitioner failed to comply with the regulatory prerequisites for a "deposit" to be accepted by the United States, it cannot be said either as a matter of fact or of law that the United States entered into a consensual deposit relationship. Moreover, the statutes under which the remittances involved in this case were made specify that any "tax withheld from wages" or "paid as estimated income tax" for the year "shall be deemed to have been paid" on the date the return is first due. 26 U.S.C. 6513(b)(1), (2). That statute "conclusively determines" that withholding taxes and estimated taxes are "for statute of limitations purposes deemed 'paid' on the April 15th following the close of

the tax year." *Ehle* v. *United States*, 720 F.2d 1096, 1097 (9th Cir. 1983) (per curiam).

Under Section 6513(b), remittances of withholding and estimated taxes are "necessarily payments rather than deposits" for purposes of the statute of limitations on tax refunds. *Ott* v. *United States*, 141 F.3d 1306, 1309 (9th Cir. 1998). Because petitioner made his claim for refund more than three years after he paid the tax, his refund claim is barred by the plain language of Section 6511(b)(2)(A) and was therefore properly denied in this case.

ARGUMENT

I. REMITTANCES OF ESTIMATED TAXES AND OF TAXES WITHHELD FROM WAGES CONSTITUTE PAYMENTS OF TAX THAT ARE SUBJECT TO THE LIMITATION ON TAX REFUNDS SET FORTH IN SECTION 6511(b) OF THE INTERNAL REVENUE CODE

Section 6511 of the Internal Revenue Code establishes an intricate and comprehensive structure for the disposition of all tax refund claims—a structure that combines the requirement of a prompt presentation of the claim with several substantive limits on recovery. 26 U.S.C. 6511(a), 6511(b).[3] With respect to a tax for

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[3] Sections 6511(a) and 6511(b) were enacted in essentially their current form as part of the Internal Revenue Code of 1954 (ch. 736, 68A Stat. 808). The precursor of these provisions was Section 281(b) of the Revenue Act of 1924, ch. 234, 43 Stat. 301, in which Congress (i) provided a finite period during which a claim for refund of income, war and excess profits taxes could be made and (ii) then further specified that "[t]he amount" of any refund of such taxes shall not "exceed the portion of the tax paid during the" period expressly permitted for the refund claim to be filed. Similarly, Section 322(b) of the Revenue Act of 1932 (ch. 209, 47

which a return is required (such as an income tax), Section 6511(a) requires that an administrative refund claim be filed within three years of the time the return was filed or two years of the time the tax was paid, "whichever of such periods expires the later." 26 U.S.C. 6511(a).[4] In addition to this time limitation on

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Stat. 242) provided a two-year period of limitation for the filing of claims for refund of income taxes—calculated from the time of payment—and also limited the refund to the amount of tax paid within the two years prior to the filing of the claim. See *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 527, 530 (1947). Section 810 of the Revenue Act of 1932, ch. 209, 47 Stat. 283, provided a similar structure for estate tax refunds in order "to remove all question as to the precise effect of a period of limitation on refunds which runs from the payment of the tax." S. Rep. No. 665, 72nd Cong., 1st Sess. 53 (1932). Section 6511 brought these various provisions into a single statute that governs the payment of refund claims for "any tax imposed" under the Internal Revenue Code. 26 U.S.C. 6511(a).

[4] No suit for the recovery of an internal revenue tax is permitted unless the taxpayer has "duly filed" an administrative claim for refund "according to the provisions of law" (26 U.S.C. 7422(a)). The applicable "provisions of law" are those set forth in Section 6511 of the Code, 26 U.S.C. 6511. If a taxpayer fails to file a timely claim for refund under Section 6511(a) of the Code, no refund of a claimed overpayment of the tax is allowable. 26 U.S.C. 6511(b)(1).

In *Miller* v. *United States*, 38 F.3d 473, 475-476 (9th Cir. 1994), the court concluded that an untimely return cannot extend the time for filing an administrative claim for refund under Section 6511(a) of the Code. Under the reasoning of that decision, the claim of petitioner in the present case would be barred because it was filed more than three years after the date that the return was due. See *ibid.* The Internal Revenue Service has not, however, contended that a late-filed return does not constitute a "return" for purposes of the three-year statute of limitations on the filing of administrative refund claims under Section 6511(a). See Rev. Rul. 76–511, 1976–2 C.B. 428. The issue that the court of appeals raised and resolved on its own initiative in the *Miller* case was therefore not raised, and is not presented, in this case.

the presentation of a refund claim under Section 6511(a), Congress has imposed specific "substantive limitations on the amount of recovery" on tax refund claims under Section 6511(b) of the Code. *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997). These substantive limitations are set forth in "unusually emphatic form." *Id.* at 350. When, as in the present case, a refund claim is filed within three years of the filing of the return, this statute specifies that (26 U.S.C. 6511(b)(2)(A)):

> the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return * * * .

All of petitioner's withholding and estimated tax remittances were actually tendered to the government more than four years before his return and refund claim were filed (Pet. App. A6). Under Section 6513(b) of the Code, Congress has specified that such mid-year payments of withholding tax and estimated tax are "deemed" to be "paid" on the subsequent date that the return for that year is due. 26 U.S.C. 6513(b)(1)-(2). Moreover, in enacting (what is now) Section 6513(b), Congress emphasized that such remittances are deemed to be paid on the date the return is first due "for the purpose of the provisions of law relating to refund or credit" of the income tax. H.R. Conf. Rep. No. 510, 78th Cong., 1st Sess. 54 (1943). See pages 27-29, *infra*. Because petitioner's claim for refund was made more than three years after the date on which his payments were "deemed to [be] paid" under Section 6513(b), the court of appeals correctly held that, under Section 6511(b)(2)(A), these payments may not now be

refunded under the "plain language of the statute" (Pet. App. A3). Accord, *Ott* v. *United States*, 141 F.3d 1306, 1309-1310 (9th Cir. 1998); *Gabelman* v. *Commissioner*, 86 F.3d 609, 612 (6th Cir. 1996); *Ehle* v. *United States*, 720 F.2d 1096, 1097 (9th Cir. 1983).[5]

II. REMITTANCES OF WITHHOLDING TAXES AND ESTIMATED TAXES ARE "PAYMENTS" OF TAX AND ARE NOT "DEPOSITS"

Notwithstanding the plain language of these interrelated statutory provisions, petitioner asserts that withholding and estimated tax payments should not be "deemed to have been paid" on the date the return is due (26 U.S.C. 6513(b)(1), (2)) and should not be treated as "payments" of tax to which the limitations of Section 6511(b) apply. None of the rationales offered by petitioner is correct.

1. Petitioner's principal contention is that a taxpayer can not properly be regarded as having "paid" a tax at any time before his liability is "defined, known, and fixed by assessment" (Pet. Br. 9). He asserts that, until the amount of his liability is formally assessed, withholding and estimated tax payments can represent only "deposits" rather than "payments" of tax—and that the limitation on refunds set forth in Section 6511(b) therefore does not apply to this case.

There are numerous flaws in this contention. In particular, it ignores the fact that the liability of any

[5] This Court has frequently emphasized that statutes that prescribe the limitations on a consent to suit by the United States are to be strictly construed in favor of the government. E.g., *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941); *United States* v. *Michel*, 282 U.S. 656, 659 (1931) (a tax refund "suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued").

taxpayer for the federal income tax arises upon his receipt of "taxable income" (26 U.S.C. 1(a)). This liability does not depend on any subsequent assessment of the tax by the Internal Revenue Service. To the contrary, Section 6151(a) of the Code specifies that the obligation to pay the tax is fixed by law, "without assessment" or any notice or demand, on the due date of the return. 26 U.S.C. 6151(a) ("the person required to make such return *shall, without assessment* or notice and demand from the Secretary, *pay such tax* * * * at the time and place fixed for filing the return") (emphasis added).[6] As this Court stated in *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, 565 (1950), on the date a return is required to be filed, "the taxpayer has a positive obligation to the United States: a duty to pay its tax." See also 26 U.S.C. 6012(a), 6072; *Blatt* v. *United States*, 34 F.3d 252, 256-257 (4th Cir. 1994) (estimated tax is a "payment" of tax because tax is due and payable without assessment).

Other provisions of the Internal Revenue Code similarly reflect that a taxpayer's obligation to pay the tax exists independently of an "assessment." For example, Section 6213(b)(4) specifies that "*[a]ny amount paid* as a tax or in respect of a tax *may be assessed* upon the receipt of such payment." 26 U.S.C. 6213(b)(4) (emphasis added). In enacting this provision, Congress plainly contemplated that "payment" may precede "assessment." Similarly, Section 6401(c) specifies that "[a]n amount paid as tax" may be refunded as an

[6] From the first enactment of these provisions, the Treasury Department has consistently ruled that the applicable period of limitations on tax refund claims runs from the date of payment of the tax, rather than from the date that the tax is assessed. See S.M. 3380, IV-1 C.B. 80 (1925).

"overpayment" even though "there was no tax liability in respect of which such amount was paid." 26 U.S.C. 6401(c). Petitioner's contention that a "payment" cannot occur until after the "tax liability" has been determined is simply irreconcilable with the structure and text of the Code.

The assessment serves a function far different from that posited by petitioner. The United States has a variety of statutory tools to enforce the taxpayer's "duty to pay its tax" (*Manning* v. *Seeley Tube & Box Co.*, 338 U.S. at 565). Even "without assessment," the United States may bring a collection suit against the taxpayer in federal district court. 26 U.S.C. 6501(a). When the Service makes an assessment, however, enforcement powers *in addition* to a collection suit are then granted under the Code. In particular, the federal lien for unpaid taxes, and the right to levy on the taxpayer's property to collect such taxes, arises only when "the assessment is made." 26 U.S.C. 6322; see also 26 U.S.C. 6331(a).[7]

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[7] The Internal Revenue Service generally does not make an assessment of tax until the taxpayer has filed his return and the return has been processed administratively. See 26 U.S.C. 6201(a)(1). A taxpayer who delays filing his return thereby delays the time of assessment.

Under the rule proposed by petitioner, all withholding taxes, estimated taxes, and even remittances accompanying tax returns would be merely "deposits" until the taxpayer eventually files the return, the Service processes the return and makes an administrative determination of the amounts due, and makes an assessment of the resulting tax. If such remittances were treated as "deposits," rather than as "payments," taxpayers would receive no interest on any funds thereafter returned, for interest accrues only from the date of an "overpayment" (26 U.S.C. 6611(b)(2)). As commentators have noted, the position advocated by petitioner that all remittances before assessment are "deposits" would disadvantage the ordinary taxpayer who would lose the interest to which he would otherwise be entitled from overpayments of tax that result from excess withholding. See M. Saltzman, *IRS Practice and Procedure* ¶ 11.05[1][b], at 11-33 (2d ed. 1991).

In the words of the Code, an "assessment" is made "by *recording* the liability of the taxpayer in the office of the Secretary." 26 U.S.C. 6203 (emphasis added). An assessment is only an administrative "record[]" of liability, not a prerequisite to it. As the court explained in *Moran* v. *United States*, 63 F.3d 663, 666 (7th Cir. 1995) (emphasis added and citations omitted):

> Though the [taxpayers] make it out to be more, an assessment is only a formal determination that a taxpayer owes money. *Stevens v. United States*, 49 F.3d 331, 336 (7th Cir. 1995). It is more or less a bookkeeping procedure that permits the government to bring its administrative apparatus to bear in collecting a tax. *Laing v. United States*, 423 U.S. 161, 170 n.13 (1976); 26 U.S.C. § 6203. Indeed, our tax system would function poorly were not most taxes "self-assessed." *United States v. Boyle*, 469 U.S. 241, 249 (1985). A formal IRS assessment is an important determination in many cases, and the threat of one is a significant means of maintaining a system of voluntary compliance, *see United States v. National Bank of Commerce*, 472 U.S. 713, 721 (1985), but *it is neither the beginning nor the end of tax liability.*

The only appellate authority that supports petitioner's erroneous proposition is a case that he has failed to cite. In *Thomas* v. *Mercantile National Bank*, 204 F.2d 943, 944 (1953), the Fifth Circuit held that a tax liability cannot be "paid" by a remittance made before the tax is assessed because, absent an assessment,

there is "no liability on the part of the taxpayer, and consequently nothing to pay."[8] Numerous provisions of the Code clearly reflect, however, that the liability to pay attaches "without assessment" of the tax. *E.g.*, 26 U.S.C. 6151(a), 6501(a). The other courts of appeals have therefore consistently and correctly rejected the Fifth Circuit's reasoning. See, *e.g.*, *Zeier* v. *IRS*, 80 F.3d 1360, 1364 (9th Cir. 1996); *Moran* v. *United States*, 63 F.3d at 667-668; *Ewing* v. *United States*, 914 F.2d 499, 502-503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991).[9] Indeed, the Fifth Circuit has itself twice

[8] The Federal Circuit adopted a variant of the Fifth Circuit rule in *New York Life Insurance Co.* v. *United States*, 118 F.3d 1553, 1559 (1997), cert. denied, 523 U.S. 1094 (1998). The court held that a remittance must be treated as a deposit "as a matter of law" when it is tendered before the tax is assessed and with an accompanying "protest" of the underlying liability. As the Seventh Circuit correctly concluded in rejecting that contention in *Moran* v. *United States*, 63 F.3d at 669, however, the fact that a "protest" accompanies the remittance cannot transmute a payment into a deposit, for the Code expressly specifies that taxes may be "*paid* under protest" (26 U.S.C. 7422(b) (emphasis added)). The notion that a "protest" is relevant to the determination whether a taxpayer can obtain a refund of tax is an anachronism. Prior to the passage of the Revenue Act of 1924, a taxpayer could recover an overpaid tax by suit only if the tax had been paid under protest. Section 1014 of the 1924 Act eliminated that requirement. See S. Rep. No. 398, 68th Cong., 1st Sess. 44-45 (1924).

[9] In *United States* v. *Dubuque Packing Co.*, 233 F.2d 453 (1956), the Eighth Circuit followed the Fifth Circuit's decision in *Mercantile National Bank* in holding that a remittance held by the IRS in a suspense account did not constitute payment until the tax was formally assessed. In *Essex* v. *Vinal*, 499 F.2d 226 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975), however, without discussing its prior decision in *Dubuque Packing Co.*, the Eighth Circuit held that a remittance of estimated taxes prior to assessment

questioned and criticized the reasoning of its decision in *Thomas*, noting that "payment" routinely precedes assessment under the Code and, in "most situations tax is paid with no coercive involvement of the federal tax authorities whatsoever." *Ford* v. *United States*, 618 F.2d 357, 359 (5th Cir. 1980). See also *Harden* v. *United States*, 74 F.3d 1237 (5th Cir. 1995).

2. a. Petitioner errs in contending (Pet. Br. 9, 23) that the decision of this Court in *Rosenman* v. *United States*, 323 U.S. 658 (1945), establishes a broad rule that every remittance made before assessment is a "deposit" rather than a "payment" of tax. As every court of appeals (including the Fifth Circuit) has concluded, the *Rosenman* case is not based on any such broad rule. Instead, it is based on a recognition that the underlying facts may sometimes reflect that the Internal Revenue Service and the taxpayer have agreed to treat a particular remittance as a "deposit" and not as a "payment" of tax to which the refund limitations of Section 6511(b) apply. As the court stated in *Dantzler* v. *United States Internal Revenue Service*, 183 F.2d 1247, 1252 (11th Cir. 1999), "[i]n *Rosenman*, the Court did not have before it the question whether there can be payment of tax without assessment, and it made no ruling in that regard." See also *Ford* v. *United States*, 618 F.2d at 359 ("*Rosenman* does not foreclose treating as a tax payment a remittance made prior to assessment"); *Fortugno* v. *Commissioner*, 353 F.2d 429, 435 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966) (same).

In *Rosenman*, the Court drew a distinction between a remittance tendered as a "payment" of tax—which triggers the limitations applicable to tax refund suits—

constituted a payment when the taxpayer and the IRS treated it as such.

and a remittance tendered as a "deposit"—which is not subject to those limitations. The distinction framed by the Court in *Rosenman* between tax "deposits" and tax "payments" is not grounded in any provisions of the Internal Revenue Code. The Code, which strictly regulates tax refund suits "in a highly detailed technical manner" (*United States* v. *Brockamp*, 519 U.S. at 350), contains no provision for the "deposit" of income tax remittances by a taxpayer.[10] Instead, in language that "cannot easily be read as containing implicit exceptions" (*ibid.*), Section 6511(b) comprehensively establishes unqualified limitations on the recovery of any taxes "paid" in any manner to the United States.

In *Rosenman*, however, based upon what the Court concluded was then-prevailing administrative practice, the Court held that a "deposit" occurs when a remittance is tendered to the government as part of an "interim arrangment" to cover "future" contingencies and is not tendered to "discharge * * * a liability" or to "pay one that was asserted." 323 U.S. at 662. In *Rosenman*, a remittance of estate taxes had been tendered under protest by the taxpayer and had been

[10] The Code contains narrow provisions that authorize "deposits" for specific purposes, such as special excise taxes (26 U.S.C. 6302(f)), amounts withheld at the source and required to be deposited at certain financial institutions (26 U.S.C. 6302(g), 6656), certain bonding requirements (26 U.S.C. 7101, 7485), and amounts seized as the result of a criminal investigation (26 U.S.C. 7608). Section 7809 of the Code, however, generally specifies that "the gross amount of *all taxes and revenues received* under the provisions of this title, *and collections of whatever nature received or collected by authority of any internal revenue law, shall be paid daily into the Treasury* of the United States * * * *as internal revenue collections* * * * [and that a] certificate of such payment * * * shall be transmitted to the Secretary." 26 U.S.C. 7809(a) (emphasis added).

held by the Service in a non-interest bearing "suspense" account. The Court stated that a taxpayer would enter into such a "deposit arrangement" to stop the running of penalties and interest and that the government, in exchange, obtained a "cash bond for the payment of taxes thereafter found to be due." *Ibid.* The Court stated in *Rosenman* that the government had given a "practical construction * * * [t]o such arrangements" and "does not consider" such advances from the taxpayer to constitute "tax payments." *Ibid.*

"[I]nterpret[ing] a business transaction according to its tenor," the Court concluded that "receipt by the Government of moneys under such an arrangement" constitutes a "deposit" rather than a "payment" of tax. *Rosenman* v. *United States*, 323 U.S. at 662, 663. The rationale of the Court was that a "deposit" (as distinguished from a "payment") occurs when the taxpayer and the government expressly or impliedly enter upon a "business transaction" or "arrangement" under which the remittance is tendered by the taxpayer, and accepted and treated by the government, as a "deposit * * * in the nature of a cash bond." *Id.* at at 662.[11]

[11] There is no provision in the Internal Revenue Code that creates a cause of action for a suit to recover a non-interest-bearing "deposit." The Tucker Act would provide jurisdiction for a claim to recover a "deposit" only if it were based upon an express or implied-in-fact contract with the United States. Since the federal courts lack jurisdiction to create and enforce claims against the United States based upon contracts "implied in law" (see, *e.g.*, *United States* v. *Minnesota Mut. Inv. Co.*, 271 U.S. 212, 217 (1926); *Merritt* v. *United States*, 267 U.S. 338, 341 (1925)), any "deposit arrangement" concerning a remittance of funds to the United States must be premised upon an express or implied-in-fact contract.

b. In the present case, there was plainly no consensual deposit "arrangement" of the type described by the Court in *Rosenman* between petitioner and the United States. Indeed, there were no direct communications of any type between petitioner and the government concerning the treatment to be given the remittances of withholding and estimated taxes at issue. The only expression of intent evidenced by petitioner was his use of the Form 1040-ES "Payment Voucher," under which he submitted $1100 as the "amount of payment" of his estimated taxes (C.A. App. 20). See note 1, *supra*. In *Rosenman*, unlike in the present case, the remittance had been accompanied by a letter stating that it was made "under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the [taxpayer] that not all of this sum is legally or lawfully due." 323 U.S. at 660. Moreover, unlike the present case, in which the taxpayer was entitled to receive interest on his "overpayment" if he filed a timely return (26 U.S.C. 6611(b)(2), (3)), the Service placed the remittance in *Rosenman* in a *non*-interest bearing "suspense account" to the credit of the estate. 323 U.S. at 662. See also note 7, *supra*. It was in that distinctly different factual context that the Court concluded in *Rosenman* that an implied-in-fact "business transaction" or "arrangement" had been made between the taxpayer and the government to treat the remittance as a "deposit * * * in the nature of a cash bond." *Id.* at 662.

Moreover, as the court of appeals noted, the statutes under which the remittances involved in this case were made specify that any "tax withheld from wages" or "paid as estimated income tax" for any year "shall be 'deemed to have been paid' on April 15 of the following

year." Pet. App. A3 (quoting 26 U.S.C. 6513(b)(1)-(2)). These provisions of Section 6513(b), which are entitled "Prepaid income tax" (26 U.S.C. 6513(b)), negate any implication that only a deposit, rather than a "payment," was intended. Instead, as the court of appeals correctly concluded in this case, remittances of withheld and estimated taxes constitute "payments as a matter of law" under these statutory provisions. Pet. App. A3. See pages 24-29, *infra*.

c. Following this Court's decision in *Rosenman*, the Treasury Department adopted rules that set forth the specific circumstances and conditions under which the government will accept a remittance as a consensual "deposit" rather than as a "payment" of taxes (Rev. Proc. 84–58, 1984–2 C.B. 501 (superseding Rev. Proc. 82–51, 1982–2 C.B. 839); see also Rev. Rul. 89–6, 1989–1 C.B. 119; Rev. Proc. 82-51, 1982-2 C.B. 839). Since there is no statutory basis in the Internal Revenue Code for the making of tax "deposits" by individual taxpayers, a taxpayer cannot be said to have entered into a consensual "arrangement" with the United States for a "deposit," rather than a "payment," if he has failed to comply with the conditions expressly adopted for this purpose by the Treasury. See note 11, *supra*. These conditions—which include a requirement that the taxpayer *expressly* designate the remittance as a "deposit"—were plainly not met in this case.[12] See

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[12] Under the procedures specified by the Treasury, a taxpayer —typically one under audit who expects to receive an adverse determination—must expressly designate the remittance as a deposit. If the taxpayer makes a "deposit," the Service does not consider the remittance to be a "payment" of tax. The deposit stops the running of interest on the unpaid tax liability and is returnable on demand, without interest, until such time as the Service is authorized to make the assessment. Rev. Proc. 84-58, §§

Pet. App. A6. There was thus manifestly no express or implied-in-fact consensual "business transaction" or "arrangement" between petitioner and the United States for a "deposit" rather than a "payment" to be made.

The essential prerequisites for application of this Court's decision in *Rosenman* are not satisfied in this case. Petitioner's refund claim must therefore be denied because, in filing his belated claim, he failed to "conform strictly to the requirements of Congress." *Rosenman* v. *United States*, 323 U.S. at 661.

d. There have been significant changes in the applicable provisions of the Internal Revenue Code since the *Rosenman* case arose. In particular, at the time of the disputed remittance in *Rosenman*, the Internal Revenue Service had taken the position that interest would not accrue on an overpayment of a disputed liability if it turned out that the taxpayer owed no taxes. That fact played a significant role in the Court's reasoning. The Court noted that, "where taxpayers have sued for interest on the 'overpayment' of moneys received under similar conditions, the Government ha[d] insisted that the arrangement was merely a 'deposit' and not a 'payment'" on which interest "is due

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401.3, 402.1, 1984-2 C.B. at 502. See M. Saltzman, *supra*, at 11-33, 11-34. The Treasury has recently issued a temporary regulation providing that "[s]ums submitted with an offer to compromise a liability or during the pendency of an offer to compromise are considered deposits and will not be applied to the liability until the offer is accepted unless the taxpayer provides written authorization for application of the payments." 64 Fed. Reg. 63,557 (1999) (to be codified at 26 C.F.R. 301.7122-1T(g)). The temporary regulation further provides that any refunds of such deposits are without interest. *Ibid.*

from the Government." 323 U.S. at 662. The Court emphasized that (*id.* at 663):

> If it is not payment in order to relieve the Government from paying interest on a subsequently determined excess, it cannot be a payment to bar suit by the taxpayer for its illegal retention. It will not do to treat the same transaction as payment and not as payment, whichever favors the Government.

By the time that *Rosenman* was decided in 1945, however, Congress had amended the Code to require interest to be paid on remittances that result in overpayments even if "there was no tax liability in respect of which such amount was paid." 26 U.S.C. 6401(c) (added by Section 4(d) of the Current Tax Payment Act of 1943, 57 Stat. 140). Because that provision was enacted after the remittances involved in *Rosenman* occurred, the Court expressly declined to "consider the effect" of that statute in that case. 323 U.S. at 663. In enacting that statute, however, Congress has authoritatively established that interest accrues on overpayments received in the context addressed in *Rosenman* and in the precise context of the present case.

For example, although petitioner is correct in asserting (Pet. Br. 7) that he would not be entitled to interest on his claimed 1988 overpayment until he filed his return in 1993, that is not because the government did not consider his remittances to be "payments" of tax on which interest could accrue, as was the case in *Rosenman*. Instead, it is because, while interest generally accrues from the date of any "overpayment" (26 U.S.C. 6611(b)(2)), it does not accrue until "the return is filed" when (as in this case) the taxpayer files an untimely return (26 U.S.C. 6611(b)(3)). Congress adopted the latter provision because "it is inappropriate to require

that the United States pay interest" when the taxpayer has failed to file a timely return and thereby failed to give notice to the government "that it owes such an amount." S. Rep. No. 494, 97th Cong., 2d Sess. (Vol. 1) 307 (1982).

By the time that this Court decided *Rosenman*, the Service's prior position that advance payments were not to be treated as interest-bearing "overpayments" if a tax was not actually owed had thus been legislatively overruled. The need described by the Court in *Rosenman* for some symmetry in the treatment of interest accruing on "overpayments" and "underpayments" of tax has thus now been authoritatively addressed by Congress through the specific statutory provisions enacted to resolve that issue.

3. The courts of appeals have adopted distinct and conflicting lines of authority in applying this Court's decision in *Rosenman*.[13]

a. One line of cases holds that the nature of the remittance depends on the taxpayer's "intent" in making the remittance. See, *e.g.*, *Zeier* v. *IRS*, 80 F.3d at 1360; *Moran* v. *United States*, 63 F.3d at 667-668; *Ewing* v. *United States*, 914 F.2d 499, 502-503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991); *Ameel* v. *United States*, 426 F.2d 1270, 1273 (6th Cir. 1970); *Fortugno* v. *Commissioner*, 353 F.2d at 435; *Lewyt Corp.* v. *Commissioner*, 215 F.2d 518, 522-523 (2d Cir. 1954), aff'd in part and rev'd in part on another issue, 349 U.S.

[13] The most extreme position, which all other courts have rejected (and which petitioner has failed even to cite), is that adopted by the Fifth Circuit in *Thomas* v. *Mercantile National Bank*, 204 F.2d 943 (1953). See page 13, *supra*. Petitioner cavalierly dismisses the entire body of appellate authority on the question presented in this case as simply "the eroding glosses [on *Rosenman*] of subordinate court judges" (Pet. Br. 10).

237 (1955). These courts have consistently rejected the conclusion of the Fifth Circuit that "there can be no payment of tax before the IRS makes a formal assessment of the * * * tax liability" (*Zeier* v. *IRS*, 80 F.3d at 1364). See page 14, supra. They hold, instead, that the taxpayer's intent is to be derived from the surrounding "facts and circumstances." A payment under the facts-and-circumstances test would be evidenced by the taxpayer's recognition of a tax obligation, whether by association with a return filing, the resolution of a dispute by an agreement, or other similar circumstances indicating the taxpayer's assumption of a liability. See *Ewing* v. *United States*, 914 F.2d at 504; *Ameel* v. *United States*, 426 F.2d at 1272–1273. A deposit, by contrast, would be evidenced by circumstances showing the remittance was in the nature of a bond paid in escrow to halt the accrual of interest on an anticipated liability.

Under this line of cases, the remittance of withholding and estimated taxes would quite plainly be "payments" rather than "deposits." The remittance of estimated taxes was made on a "payment voucher," which states that the taxpayer tendered $1100 as the "amount of payment." C.A. App. 20. Petitioner acknowledged that, by making these remittances, he "possibly[] had overpaid the taxes" and that, by failing to make a timely return, he was "delaying a refund" of that overpayment. *Id.* at 60. In making these remittances, moreover, petitioner did not provide any instruction or request that they be treated as deposits, as the applicable Treasury regulations require. See note 12, *supra*. The failure of the taxpayer expressly to designate the remittance as a deposit under these regulations negates the existence of any consensual deposit

relationship, both as a matter of "intent" and as a matter of law. See notes 11, 12, *supra*.[14]

b. A separate line of appellate authority looks to the specific statutory provision under which the remittances were made to determine whether the "remittances were payments as a matter of law" (Pet. App. A3). Certain specific types of remittances—such as estimated taxes and wage withholdings made under Section 6513 of the Code—have been found to constitute "payments" rather than "deposits" as a matter of law, even in the absence of any prior assessment of the tax and even in the face of a contrary expression of intent by the taxpayer.[15] See, *e.g.*, *Dantzler* v. *United States*, 183 F.3d at 1250–1251 (estimated taxes); *Ertman* v. *United States*, 165 F.3d 204 (2d Cir. 1999) (same); *Ott* v. *United States*, 141 F.3d 1306, 1309–1310 (9th Cir. 1998) (same); *Gabelman* v. *Commissioner*, 86 F.3d 609, 612–613 (6th Cir. 1996) (same); *Weigand*

[14] The fact-intensive inquiry sometimes pursued under this "facts and circumstances" test is often wasteful of judicial and taxpayer resources and should almost never be necessary. It should, in particular, be unnecessary when (as in the present case) the taxpayer has not complied with the regulatory requirement that there be an express designation of the remittance as a "deposit" at the time it is made. See note 12, *supra*. Since that is the only circumstance (other than an express offer of compromise, see *ibid.*) under which the United States has agreed to accept a "deposit," an express or implied-in-fact consensual deposit relationship could not exist in the absence of such a designation.

[15] As the Ninth Circuit stated in *Zeier* v. *Internal Revenue Service*, 80 F.3d at 1364, a taxpayer's ostensible intent to make a deposit can not "defeat a statutory mandate" that the remittance be regarded as a payment of tax.

v. *United States*, 760 F.2d 1072 (10th Cir. 1985) (same); *Ehle* v. *United States*, 720 F.2d 1096 (9th Cir. 1983) (wage withholdings). These courts have concluded that the question whether a taxpayer "intended" withheld taxes or estimated taxes to be a "deposit" is irrelevant because Section 6513(b) of the Code specifies that such taxes are "deemed to have been paid" on the date the return for that year is due. 26 U.S.C. 6513(b)(1)-(2). See *Ott* v. *United States*, 141 F.3d at 1309–1310; *Ehle* v. *United States*, 720 F.2d at 1097.[16]

[16] Petitioner errs in claiming (Pet. Br. 14) that *Schmidt* v. *Commissioner*, 272 F.2d 423 (9th Cir. 1959), *Plankinton* v. *United States*, 267 F.2d 278 (7th Cir. 1959), and *Trevelyan* v. *United States*, 219 F. Supp. 716 (D. Conn. 1963), support a conclusion that Section 6513(b) does not control the date of payment of withholding and estimated taxes. The cases that petitioner cites were decided under the 1939 Code and are inapposite to this case. The 1954 and the 1986 Codes provide that estimated and withholding taxes are deemed to be paid by the taxpayer "*on* the 15th day of the fourth month" following the close of his taxable year. 26 U.S.C. 6513(b) (emphasis added). The comparable provision of the Internal Revenue Code of 1939 stated that such taxes were considered paid by the taxpayer "*not earlier than* the fifteenth day of the third month" following the close of his taxable year. 26 U.S.C. 322(e) (1952) (emphasis added). The ambiguous nature of that provision engendered confusion among the courts as to the date of payment of estimated and withholding taxes under the 1939 Code. For example, in *Schmidt* v. *Commissioner*, 272 F.2d at 428, the court concluded that estimated taxes remitted in 1944 were not considered "paid" under this statute until 1952, when the tax return for 1944 was filed. In *Plankinton* v. *United States*, *supra*, the court expressed a similar conclusion. In *United States* v. *Miller*, 315 F.2d 354 (10th Cir.), cert. denied, 375 U.S. 824 (1963), however, the court held that estimated taxes remitted to the government during the year were considered "paid" under the 1939 Code provision on the 15th day of the third month following the close of that year. See *Trevelyan* v. *United States*, 219 F. Supp. at 721-722. In enacting Section 6513(b) of the Code,

The court of appeals correctly applied that reasoning in this case to conclude that Section 6513(b) "conclusively determines that these remittances [of withholding and estimated taxes] were payments as a matter of law" (Pet. App. A3). Petitioner realized taxable income over the course of 1988 and, at the conclusion of the year, was obliged by law to pay taxes on that income. 26 U.S.C. 1, 61, 63, 6151. Petitioner paid those taxes through a combination of wage withholdings and an estimated tax remittance submitted with a Form 1040–ES. Under the express provisions of the Internal Revenue Code, the income taxes withheld by a taxpayer's employer from wages paid over the course of the tax year, and the amount that the taxpayer paid as estimated taxes during the tax year, were "deemed to have been paid" by the taxpayer as of April 15th of the following year. 26 U.S.C. 6513(b)(1), (2). Section 6513(b) "conclusively determines" that withholding taxes and estimated taxes are "for statute of limitations purposes deemed 'paid' on the April 15th following the close of the tax year." *Ehle* v. *United States*, 720 F.2d at 1097. See also *Gabelman* v. *United States*, 86 F.3d at 612. [17]

Congress eliminated this confusion by providing a fixed date on which estimated and withholding taxes are "deemed to have been paid." 26 U.S.C. 6513(a)(1), (2). The decisions in *Schmidt*, *Plankinton* and *Trevelyan* thus have no bearing on the proper interpretation and application of Section 6513 under the 1954 and 1986 Codes. *Chemical Bank New York Trust Co.* v. *United States*, 275 F. Supp. 26, 29–30 (S.D.N.Y.), aff'd per curiam, 386 F.2d 995 (2d Cir. 1967). See also *Moran* v. *United States*, 63 F.3d at 667–668.

[17] Petitioner errs in contending (Pet. Br. 12) that this Court's decision in *United States* v. *Habig*, 390 U.S. 222 (1968), supports a conclusion that the statute of limitations for petitioner's refund

The legislative history of these provisions makes this conclusion manifest. In enacting the withholding tax and estimated tax provisions in 1944, Congress explained that such remittances constitute "payment on account of the income * * * tax" for the tax year in which they are made. H.R. Conf. Rep. No. 510, 78th Cong., 1st Sess. 54 (1943); see *id.* at 28. Congress then emphasized that such withholding and estimated tax remittances constitute "payments" of income tax for the *specific purposes* of the statute of limitations on refunds. *Id.* at 54 (emphasis added):[18]

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claim should be measured from the date that petitioner filed his tax return for 1988 (in 1993) rather than the due date of that return (in 1989). In *Habig*, the appellees were charged with attempting to evade taxes by filing a false return and the question was whether the indictment in that case was timely. Under 26 U.S.C. 6531, the applicable period of limitation on prosecution was six years from the commission of the offense. That statute further provided that, "[f]or the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable." 26 U.S.C. 6531. The appellees contended in *Habig* that their prosecution was untimely because, under the rules of Section 6513, the statute of limitations expired six years after the date the return was *due* to be filed, rather than the later date that the fraudulent return was *actually* filed. 390 U.S. at 223. The Court noted, however, that Section 6513 "prolong[s] the limitations period when, and only when, a return is filed or tax paid in advance of the statutory deadline." 390 U.S. at 225. The Court held only that this statute does not shorten the six-year limitations period with respect to an offense committed by the *late* filing of a fraudulent return. *Id.* at 226. Nothing in that holding supports petitioner's position in this case.

[18] This passage in the Conference Report refers specifically to the estimated tax provision, which is now codified as Section 6513(b)(2). The identical provision for withholding taxes, which is now codified as Section 6513(b)(1), was enacted with the same

> The taxpayer will, of course, have to file his regular income tax return as usual, and on such return the estimated tax paid will be taken into account. All such payments of estimated tax are *for the purpose of the provisions of law relating to refund or credit* * * *, including the provisions relating to interest on overpayments of such tax, *deemed to have been paid on the [date the taxpayer's return is first due]*.

In providing in (what is now) Section 6513(b) that withholding and estimated tax payments are "deemed to have been paid" on the date the return is first due (26 U.S.C. 6513(b)(1), (2)), Congress thus expressly intended such remittances to be "deemed * * * paid" for the purpose of the statute of limitations "relating to refund or credit" (H.R. Cong. Rep. No. 510, *supra*, at 54).[19] Because Congress consciously designed these interrelated provisions for the express purpose of requiring withholding and estimated tax remittances to be treated as "payments" of tax for purposes of "the provisions of law relating to refund" (*ibid.*), such remittances are "necessarily payments rather than deposits" for purposes of the statute of limitations. *Ott* v. *United States*, 141 F.3d at 1309. See also *Ehle* v. *United States*, 720 F.2d at 1097; *Gabelman* v. *Commissioner*, 86 F.3d at 612–613; *David* v. *United States*, 964 F. Supp. 31, 37 (D. Mass.), aff'd, 80 A.F.T.R.2d 97-8427 (1st Cir. 1997); *United States* v. *Miller*, 315 F.2d at 359; *Holtvogt* v. *United States*, 887 F. Supp. 994 (S.D. Ohio 1995).

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language as part of this same legislation. See H.R. Conf. Rep. No. 510, *supra*, at 16.

[19] Petitioner states (Pet. Br. 18) that the legislative history of Section 6513 of the Code contains "no reference to [*Rosenman*] or its rationale." Since the provisions ultimately brought together in Section 6513(b) were first enacted in 1944, before *Rosenman* was decided in 1945, that should hardly be surprising. Moreover, in adopting the withholding and estimated tax provisions in 1944, Congress was not concerned with establishing mechanisms for consensual "deposits" of the type at issue in *Rosenman*. Instead, Congress was specifying precise dates on which withholding taxes and estimated taxes are "deemed to have been paid" (26 U.S.C. 6513(b)(1), (2)).

4. Petitioner's brief makes the novel contention (Pet. Br. 15) that the proper inquiry in a case such as this is *not* whether the remittances of withholding and estimated taxes were "payments" or "deposits" of tax but is, instead, "what tax obligation" those remittances pay. Petitioner asserts (*id.* at 7-9, 11-13, 15, 19) that withholding and estimated tax payments are somehow different and distinct from income tax payments, to which the limitations of Section 6511 apply.

That contention is squarely refuted by the text and history of Section 6513(b), as we have explained on pages 24-28, *supra*. Indeed, in adopting the withholding and estimated tax provisions, Congress expressly stated that such remittances are to "be considered payments on account of the income * * * tax * * * for the purpose of the provisions [of the Code] relating to refund or credit" of that tax. H.R. Conf. Rep. No. 510, *supra*, at 54; see *id.* at 20.

Petitioner's attempt to distinguish the withholding tax and the estimated tax from the income tax is thus fundamentally flawed. Withholding tax and estimated tax payments are simply methods of collecting *income* taxes as the income is earned and before the final amount of the tax has been determined. Remittances of withholding and estimated taxes may be refunded to the taxpayer only to the extent that they result in an overpayment of income tax. Section 6315 thus specifies that "*[p]ayment of the estimated income tax*, or any installment thereof, *shall be considered payment on*

account of the income taxes imposed * * * for the taxable year." 26 U.S.C. 6315 (emphasis added). Section 31(a)(1) similarly provides that the amount withheld as tax from wages is a credit against the taxpayer's income tax liability for that tax year. 26 U.S.C. 31(a)(1). If these amounts exceed the amount of the taxpayer's actual income tax liability, a refund is allowed "as an overpayment" of the income tax. 26 U.S.C. 6401(b)(1). See also 26 U.S.C. 6402(a).

Any refund or credit of an "overpayment" resulting from withholding or estimated tax payments, however, is limited to the amount of such payments made "within the applicable period of limitations." 26 U.S.C. 6402(a).[20] The "applicable period of limitations" is the period specified for a refund of income tax in Section 6511 of the Code. Because petitioner failed to comply with those statutory limits, his refund claim was properly denied in this case. [21]

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[20] Petitioner errs in seeking to compare the credit for taxes withheld (26 U.S.C. 31) with various other credits granted by the Code, such as those for childcare and the foreign tax credit, which become "payments of income tax only when they are applied on the taxpayer's return to the income tax" (Pet. Br. 22). The difference between withholding and estimated tax payments, and the various credits cited by petitioner, is that the former are to "be considered payments on account of the income * * * tax." H.R. Conf. Rep. No. 510, *supra*, at 54. When withholding or estimated tax payments in excess of the tax liability occur, the Code therefore specifies that "the amount of such excess shall be considered as an overpayment." 26 U.S.C. 6401(b)(1). See also 26 U.S.C. 6315.

[21] Petitioner points out (Pet. Br. 26-27) that a taxpayer who "was not subject to withholding, paid no estimates, and filed his income tax return ten or even twenty years late, making payment of the tax with the return" would still have three years in which to file a timely claim for refund under Section 6511(b). But see note 4, *supra*. In this case, however, petitioner's refund claim was filed *more than* three years after the taxes were paid. His refund claim is therefore barred by the express terms of Section 6511(b)(2)(A) of the Code, 26 U.S.C. 6511(b)(2)(A).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 6151(a) of the Internal Revenue Code, 26 U.S.C. 6151, provides in relevant part:

> Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).
>
> * * * * *

2. Section 6315 of the Internal Revenue Code, 26 U.S.C. 6315, provides in relevant part:

> Payment of the estimated income tax, or any installment thereof, shall be considered payment on account of the income taxes imposed by subtitle A for the taxable year.

3. Section 6401 of the Internal Revenue Code, 26 U.S.C. 6401, provides in relevant part:

> (a) The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

(b)(1) If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, and D of such part IV), the amount of such excess shall be considered an overpayment.

* * * * *

4. Section 6402 of the Internal Revenue Code, 26 U.S.C. 6402, provides in relevant part:

(a) In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c) and (d), refund any balance to such person.

(b) The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

* * * * *

5. Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511, provides in relevant part:

(a) Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b)(1) No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) (A) If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

* * * * *

6. Section 6513 of the Internal Revenue Code, 26 U.S.C. 6513, provides in relevant part:

(a) For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.

(b) For purposes of Sections 6511 and 6512—

(1) Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of

the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

(3) Any tax withheld at the source under chapter 3 shall, in respect of the recipient of the income, be deemed to have been paid by such recipient on the last day prescribed for filing the return under section 6012 for the taxable year (determined without regard to any extension of time for filing) with respect to which such tax is allowable as a credit under section 1462. For this purpose, any exemption granted under section 6012 from the requirement of filing a return shall be disregarded.

* * * * *

(d) If any overpayment of income tax is, in accordance with section 6402(b), claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year (whether or not claimed as a credit in the return of estimated tax for such succeeding taxable year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year in which the overpayment arises.

* * * * *

7. 26 C.F.R. 301.6402-3 provides in relevant part:

(a) In the case of a claim for credit or refund filed after June 30, 1976—

* * * * *

(5) A properly executed individual, fiduciary, or corporation original income tax return or an amended return (on 1040X or 1120X if applicable) shall constitute a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return (or amended return). For purposes of section 6511, such claim shall be considered as filed on the date on which such return (or amended return) is considered as filed, except that if the requirements of §301.7502-1, relating to timely mailing treated as timely filing are met, the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return (or amended return) was mailed. A return or amended return shall constitute a claim for refund or credit if it contains a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return (or amended return) is filed. If the taxpayer indicates on its return (or amended return) that all or part of the overpayment shown by its return (or amended return) is to be applied to its estimated income tax for its succeeding taxable year, such indication shall constitute an election to so apply such overpayment, and no interest shall be allowed on such portion of the overpayment credited and such amount

shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.

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